

U.S. Department of Labor

**Board of Contract Appeals
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Appeal of : Date Issued: July 21, 1997
: Case No. 94-BCA-3
KUMIN ASSOCIATES, INC. :
Appellant :
: Contract No. 99-1-4907-14-032-01:
.....:

For Appellant:

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For Government:

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BEFORE: LEVIN, MILLER and VITTON
Levin, Administrative Judge

DECISION AND ORDER

This matter is before the Board on appeal by Kumin Associates, Inc., from a Contracting Officer's December 14, 1993, final decision denying a claim totalling \$84,154.00 for architect/engineer services arising out of a U. S. Department of Labor Job Corps construction project at Palmer, Alaska.

The project involved construction of a new Job Corps Center consisting of nine buildings including male and female dormitories and a single-parent wing as an Add-Alternate extension of the female dormitory. Kumin Associates, Inc., (hereinafter, "Kumin") pursuant to Contract Number 99-1-4907-14-032-01, agreed to provide the architectural design plans and project construction administration oversight for a fixed price of \$1,222,313.

Following completion of the design work, Kumin sought an

equitable adjustment for extra work allegedly associated with changes in design of the female dormitory. Kumin contends that the Department of Labor changed the original scope of work to reduce the number of Job Corps participants which the female dormitory and Add-Alternate together were authorized to house if funding for the Add-Alternate were eventually approved. According to Kumin, this change entailed considerable design work not contemplated by the original scope of work.

The Board has considered the entire record, including the testimony adduced at the hearing, the documents in evidence, and the arguments of the parties at the hearing and articulated in the post-hearing briefs, and concluded that Kumin is entitled to the equitable adjustment requested. The Board's findings and conclusions are set forth below.

Findings of Fact Introduction

1. Pursuant to a Solicitation for Bids, the Department of Labor (hereinafter, "Department") sought to acquire the services of an Architect/Engineer contractor for the design and construction of a job corps center in Palmer, Alaska. (hereinafter, "the Center") (GX 1, p. 697).¹ Upon receipt of bids for the proposed work, the Department instituted a bidding review process which evaluated the qualifications of interested applicants. (Tr. 427-430). After completion of the competitive bidding process, and prior to discussion of the actual fee for the firm, the Department sought assurances that the Architect could "design to" the project budget. (Tr. 433). The term "design to" meant that the Architect would design the project in a manner which would permit the Center actually to be constructed at a cost which did not exceed the amount the Department had budgeted. (Tr. 434). Kumin provided assurances that it could design the Center within the Project budget.

2. On or about March 11, 1991, following extensive fee negotiations, (Tr. 40, 330), the Department entered into a fixed price architect-engineer contract with Kumin in the original amount of \$1,222,313, to produce plans for the Center. (GX 1, p. 466). The project was designated as Design and Construction Administration of a New Job Corps Center, Contract No. 99-1-4907-14-032-01 (hereinafter, sometimes "Palmer Project" or "Project"). (GX 1, p. 466). On that same date, the Government issued a

¹"Tr." references are to the transcript of the hearing held in Anchorage, Alaska on June 5-8, 1995. "GX" refers to Government Exhibits, and "App. Ex." refers to Appellant's Exhibits.

notice to proceed. (GX 1, p. 465). The negotiated fee was eventually reduced to \$1,205,854.22 on January 6, 1992, by Contract Modification No. 2. (GX 1, pp. 459-462).

3. Relevant Contract Provisions include the following:

52.243-1 CHANGES--FIXED PRICE ALTERNATE III

(a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in the services to be performed.

(b) If any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, the Contracting Officer shall make an equitable adjustment in the contract price, the delivery schedule, or both, and shall modify the contract.

(c) The Contractor must assert its right to an adjustment under this clause within 30 days from the date of receipt of the written order. However, if the Contracting Officer decides that the facts justify it, the Contracting Officer may receive and act upon a proposal submitted before final payment of the contract.

(d) If the Contractor's proposal includes the cost of property made obsolete or excess by the change, the Contracting Officer shall have the right to prescribe the manner of the disposition of the property.

(e) Failure to agree to any adjustment shall be a dispute under the Disputes clause. However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

(f) No services for which an additional cost or fee will be charged by the Contractor shall be furnished without the prior written authorization of the Contracting Officer.

52.243-7 NOTIFICATION OF CHANGES

(a) Definitions. "Contracting Officer," as used in this clause, does not include any representative of the Contracting Officer. "Specifically authorized representative (SAR)," as used in this clause, means any person the Contracting Officer has so designated by written notice (a copy of which shall be provided to the Contractor) which shall refer to this subparagraph and shall be issued to the designated representative before the SAR exercises such authority.

(b) Notice. The primary purpose of this clause is to obtain prompt reporting of Government conduct that the Contractor considers to constitute a change to this contract. Except for changes identified as such in writing and signed by the Contracting Officer, the Contractor shall notify the Administrative Contracting Officer in writing promptly, within thirty calendar days from the date that the Contractor identifies any Government conduct (including actions, inactions, and written or oral communications) that the Contractor regards as a change to the contract terms and conditions. On the basis of the most accurate information available to the Contractor, the notice shall state--

(1) The date, nature, and circumstances of the conduct regarded as a change;

(2) The name, function, and activity of each Government individual and Contractor official or employee involved in or knowledgeable about such conduct;

(3) The identification of any documents and the substance of any oral communication involved in such conduct;

(4) In the instance of alleged acceleration of scheduled performance or delivery, the basis upon which it arose;

(5) The particular elements of contract performance for which the Contractor may seek an equitable adjustment under this clause, including--

(i) What contract line items have been or may be affected by the alleged change;

(ii) What labor or materials or both have been or may be added, deleted, or wasted by the alleged change;

(iii) To the extent practicable, what delay and disruption in the manner and sequence of performance and effect on continued performance have been or may be caused by the alleged change;

(iv) What adjustments to the contract price, delivery schedule, and other provisions affected by the alleged change are estimated; and

(6) The Contractor's estimate of the time by which the government must respond to the Contractor's notice to minimize cost, delay or disruption of performance.

(c) Continued performance. Following submission of the notice

required by (b) above, the Contractor shall diligently continue performance of this contract to the maximum extent possible in accordance with its terms and conditions as construed by the Contractor, unless the notice reports a direction of the Contracting Officer or a communication from a SAR of the Contracting Officer, in either of which events the Contractor shall continue performance; provided, however, that if the Contractor regards the direction or communication as a change as described in (b) above, notice shall be given in the manner provided. All directions, communications, interpretations, orders and similar actions of the SAR shall be reduced to writing promptly and copies furnished to the Contractor and to the Contracting Officer. The Contracting Officer shall promptly countermand any action which exceeds the authority of the SAR.

(d) Government response. The Contracting Officer shall promptly, within thirty calendar days after receipt of notice, respond to the notice in writing. In responding, the Contracting Officer shall either--

(1) Confirm that the conduct of which the Contractor gave notice constitutes a change and when necessary direct the mode of further performance;

(2) Countermand any communication regarded as a change;

(3) Deny that the conduct of which the Contractor gave notice constitutes a change and when necessary direct the mode of further performance;

(4) In the event the Contractor's notice information is inadequate to make a decision under (1), (2), or (3) above, advise the Contractor what additional information is required, and establish the date by which it should be furnished and the date thereafter by which the Government will respond.

(e) Equitable adjustments. (1) If the Contracting Officer confirms that Government conduct effected a change as alleged by the Contractor, and the conduct causes an increase or decrease in the Contractor's cost of, or the time required for, performance of any part of the work under this contract, whether changed or not changed by such conduct, an equitable adjustment shall be made--

(i) In the contract price or delivery schedule or both; and

(ii) In such other provisions of the contract as may be affected.

(2) The contract shall be modified in writing accordingly. In

the case of drawings, designs, or specifications which are defective and for which the Government is responsible, the equitable adjustment shall include the cost and time extension for delay reasonably incurred by the Contractor in attempting to comply with the defective drawings, designs or specifications before the Contractor identified, or reasonably should have identified, such defect. When the cost of property made obsolete or excess as a result of a change confirmed by the Contracting Officer under this clause is included in the equitable adjustment, the Contracting Officer shall have the right to prescribe the manner of disposition of the property. The equitable adjustment shall not include increased costs or time extensions for delay resulting from the Contractor's failure to provide notice or to continue performance as provided, respectively, in (b) and (c) above.

NOTE: The phrases "contract price" and "cost" wherever they appear in the clause, may be appropriately modified to apply to cost-reimbursement or incentive contracts, or to combinations thereof. (AF 665-8.)

IDENTITY AND AUTHORITY OF THE CONTRACTING OFFICER'S TECHNICAL REPRESENTATIVE

(A) The authorized representative of the Contracting Officer is Al Stith whose authority to act on behalf of the Contracting Officer is limited to the extent set forth in (B) below. Under no circumstances is the Contracting Officer's Technical Representative authorized to sign any contractual documents or approve any alteration to the contract involving a change in the scope, price, terms or conditions of the contract or order.

(B) The Contracting Officer's Representative is authorized to:

(1) Monitor and inspect Contractor's performance to ensure compliance of the scope of work.

(2) Make determinations relative to satisfactory or unsatisfactory performance, including acceptance of all work performed and/or all products produced under the terms of the contract.

(3) Review and approve all invoices.

(4) Review and approve Contractor's project staff as may be called for on the contract.

(5) Recommend program changes to the Contracting Officer as a result of monitoring or as may be requested by the Contractor.

(6) Review, coordinate changes or corrections, if any, and accept all reports (including any final reports) required under the contract.

4. Kumin is an architectural planning firm, (Tr. 186, 325) which employs about 30 people, half of whom are architects. Jon P. Kumin is managing principal of Kumin and a licensed architect. (Tr. 325; GX 1, p. 692). Chip Bannister was Kumin's project architect for the Palmer Project. (Tr. 186).

5. Kumin and its consultants provided architect/engineer services for both design and construction administration for the Project. (GX 1, pp. 466, 560).

6. On March 19, 1991, Kumin formally subcontracted with Tryck Nyman Hayes, Inc. (hereinafter, Tryck Nyman) to provide the civil and structural design work for the Palmer Project. (App. Ex. 2; Tr. 114). Bill Smith is a civil and structural engineer at Tryck Nyman, and served as its principal engineer on Palmer Project. (Tr. 112). RSA Engineering (hereinafter, "RSA") provided the mechanical and electrical design work. (App Ex. 2; Tr. 44). Lee F. Holmes is the principal mechanical engineer at RSA Engineering, and was its project engineer at the Center. (Tr. 38). RSA and Tryck Nyman billed Kumin for work performed on the Project and Kumin was contractually obligated to pay them upon acceptance of a consolidated bill by the Department and receipt of payment in respect of the bill by Kumin. (App. Ex. 2; App. Ex. 7).

7. John Steenbergen is the Contracting Officer for this project. Michael F. P. O'Malley is an architect, and the government authorized representative (GAR). (Tr. 398, 401). Prior to his employment with the Department, O'Malley was a Deputy Team Leader with the firm of Daniel, Mann, Johnson, and Mendenhall/HTB, (hereinafter, "DMJM").

8. DMJM, formerly a subsidiary of Ashland Oil Company, is presently an employee-owned joint venture which has contracted to provide architectural and engineering support to the Department. (Tr. 623-26). DMJM served as a consultant to Steenbergen on this project. (Tr. 400-01).

9. Troy Caperton is a Team Leader with DMJM. He served as the project manager who succeeded O'Malley on the Palmer Project when O'Malley left DMJM to join the staff of the Contracting Officer. (Tr. 623, 625-754).

Scope of Work

10. With respect to designs of the resident dormitories which are the subject of this appeal, the scope of work set forth in the contract provided generally:

As proposed, the New Job Corps Center, located in Palmer, Alaska will provide training for an authorized strength of 240 resident corpsmembers (120 male and 120 female). (GX 1, p. 477).

MALE DORMITORY

11. The scope of work required the architect to design a dormitory which would house 120 men. The design proposed by the Department, which the architect was to some extent free to vary, depending upon site conditions and design efficiencies, portrayed a single story slab-on-grade structure with a "footprint" in the form of the letter "H." (GX 1, pp. 529, 549; See also, Finding 25, infra).

12. The male dormitory was configured programmatically as follows:

<u>SPACE</u>	<u>AREA</u> <u>(NSF)</u>	<u>ROOMS/</u> <u>CLUSTER</u>	<u>NSF/</u> <u>CLUSTER</u>	<u>TOTAL NSF</u>
5-Person Rooms	450	2	900	3,600
4-Person Rooms	300	5	1,500	6,000
Toilet/Bath	50	7	350	1,400
Lounge	240	1	240	960
Study	120	1	120	480
Laundry	100	1	100	400
R/A Office	100	1	100	400
Sub-Total				13,240

<u>SPACE</u>	<u>AREA</u>	<u>ROOMS</u>	<u>TOTAL NSF</u>
Lobby/Common	800	1	800
Male Toilet	50	1	50
Female Toilet	50	1	50
Counsel	100	2	200
Sub-Total			1,100
Total			14,340

The total gross square footage of this area could not exceed 19,500 GSF. (GX 1, pp. 529).

FEMALE DORMITORY

13. The scope of work design objectives for the female dormitory were virtually identical to those established for the male dormitory. The dormitory would house 120 female corpsmembers, and, again, the design proposed by the Department portrayed a single story slab-on-grade structure with a "footprint" in the form of the letter "H." (GX 1, pp. 534, 536, 549). This building was designated as "Section A" in the design objectives of the female dormitory. (GX 1, p. 534).

14. The female dormitory was configured programmatically as follows:

SPACE	AREA (NSF)	ROOMS/ CLUSTER	NSF/ CLUSTER	TOTAL NSF/ SECTION A
5-Person Rooms	450	2	900	3,600
4-Person Rooms	300	5	1,500	6,000
Toilet/Bath	50	7	350	1,400
Lounge	240	1	240	960
Study	120	1	120	480
R/A Office	100	1	100	400
Laundry	100	1	100	400
Sub-Total				13,240

<u>SPACE</u>	<u>AREA</u>	<u>ROOMS</u>	<u>TOTAL NSF</u>
Lobby/Common	1,000	1	800
Counsel	100	2	200
Male Toilet-Lobby	50	1	50
Female Toilet-Lobby	50	1	50
Sub-Total			1,100
Total			14,340

(GX 1, p. 535)

15. The architectural, mechanical/plumbing, and electrical design specifications for the female dormitory were identical to the corresponding specifications for the male dormitory as described in the scope of work. (GX 1, p. 536).

Female Dormitory Add-Alternate Single-parent wing

16. The scope of work also required the architect to design the Add-Alternate, a structure which could be attached as a

separate wing to the women's dormitory. The structure, identified as "Section B," of the women's dormitory design objectives, consisted of 24 apartments for 24 single parents and their children. (GX 1, p. 534).

No funding was available to construct Section B, at the time the contract was executed but the architect was expected to design a single parent structure and identify it as an Add-Alternate in the contract documents should funding materialize. (GX 1, p. 534). Contract documents and various witnesses during the course of the hearing referred to this Add-Alternate as the single-parent wing, the single-parent dormitory, the single-parent program, Section B, "SPD," and "SPW." (GX 1, pp. 80, 534, 535, See, Tr. 72, 100, 177, 197, 204-05, 318, 667-68).

17. The following table represents the programmatic space requirements for the Add-Alternate:

<u>SPACE</u>	<u>(NSF AREA)</u>	<u>ROOMS</u>	<u>TOTAL NSF</u>
Studio Bedroom	200	24	4,800
Bathroom	35	24	480
Counter/Closet	10	24	240
Quiet Lounge	160	2	320
Counsel	100	4	400
Storage	150	2	300
Active Lounge	600	2	1,200
R/A Office	100	2	200
Diaper Room	50	2	100
Kitchenette	75	2	<u>150</u>
Sub-Total			8,550

(GX 1, p. 535).

18. Thus, the scope of work here pertinent required the architect to produce design drawings for, a male dormitory which would house 120 corpsmembers, a female dormitory which would house 120 corpsmembers, and the Add-Alternate or single-parent wing which would house 24 single parents and their children, and could be constructed as an extension to the female dormitory (GX 1, pp. 466, 469).

The specifications set forth identical programmatic requirements for the male and female dorms housing 120 members respectively, 240 members total, and each building totalling 14,340 net square feet with common areas. (GX 1, p. 529, 535). With funding for the Add-Alternate, the programmatic space requirements for the single-parent dorm (Section B) totalling 8,550 net square feet and 24 additional corpsmembers were simply

added to the female dormitory. (GX 1, p. 535-36).

19. Pursuant to the scope of work, the male and female dormitories were essentially generic, such that the configuration of the female dormitory was identical to the male dormitory. (GX 1, p. 416; Tr. 521, 603, 630). The electrical and mechanical designs were "basically identical" for the two dormitories. (Tr. 41-45, 75-76). For purposes of the structural design, the female dormitory was a "carbon copy" of the male dormitory. (Tr. 115-16, 156). Architecturally, the design of the male and female dormitories was "identical." (Tr. 189, 297, 369-71, 630). Functionally, each dormitory would provide housing for 120 corpsmembers. (Tr. 521, 603, 630). For the generic dorm identified as the female dormitory, the architect was required to provide a design interpretation demonstrating a method of attaching the add-alternate, single-parent wing. (Tr. 516).

20. Michael F.P. O'Malley drafted the scope of work for the Palmer Project in his capacity as Deputy Team Leader at DMJM. (Tr. 404-06, 408). His draft was reviewed by DMJM, Department Region 10 Job Corps officials, the office of the Contracting Officer, (Tr. 409-10, 604-05), and was approved by the Department before it was finalized. (Tr. 410).

O'Malley testified that although he never advised the architect that the identical plan could be used for both the male and female dormitories, he did suggest that "because there were so many similar elements found in the male and female dormitories that we thought that there would be some economy in design since you could use some of the elements in the male and just redevelop them for the female dormitory." (Tr. 442. See, Tr. 571).

21. O'Malley subsequently clarified the number of similarities between the two dormitories where economies could be achieved. The scope of work included drawings of building prototypes for the male and female dormitories (GX 1, p. 549). O'Malley noted that these prototypes depicted essentially identical buildings. (Tr. 369-71, 515). Differences between the two dormitories did exist, although as a practical matter, they were neither substantial in design complexity or cost. For example, the Department wanted space in the Laundry Room of the female dormitory for a sink and a hair dryer, (Tr. 517-18), and expected different color schemes and carpeting for the two dormitories. (Tr. 523). The female dormitory also required a design variation which permitted the attachment of the Add-Alternate (Tr. 516), but the attachment design was regarded as a negligible difference in the overall design of the two dormitories. (Tr. 100, 154, 297, 309-10, 516, 571, 600, 603).

22. The Board finds that the scope of work contemplated a Job Corps Center which provided housing for a total of 240 corpsmembers, or 120 men and 120 women, if funding for the Add-Alternate was not available, and housing for a total of 264 corpsmembers, including 120 men, 120 women, and 24 single parents, if funding for the Add-Alternate was forthcoming. (Tr. 516, 45, 196-97, 633-34, 724-35; (GX 1, pp. 477, 529, 534, 535-36).

Preliminary Design Meeting
15% Review

23. The scope of work required the Architect/Engineer to submit its drawings for review and approval at four stages of the design process. Thus, Department approval was required at 15% design completion, 30%, 60%, and for the final designs.

24. The 15% review or "over-the-shoulder" meeting convened on April 30, 1991, approximately midway between the notice to proceed and the due date for the 30% submittal. (GX 1, p. 471). The preliminary design review meeting was variously described in this record as the "15% review", the "on-board review", the "over-the-shoulder review" and "special study". (GX 1, 471, 565, Tr. 86, 168, 199, 632, 730). The purpose of the preliminary design meeting was to evaluate the conceptual plans and elevations and to ascertain that the design met the project's programmatic requirements.

25. Participants at the 15% review meeting included O'Malley, Caperton, Jon Kumin, Bannister, Jack Krois, Administrator of the Job Corps program for Region X, and Krois' deputy, Pat Putnins, officials from the City of Palmer, Alaska, and others. (Tr. 311-12; GX 1, pp. 450, 458).

26. In preparation for this meeting, the architects prepared sketches of the various buildings including the male and female dormitories, and the Add-Alternate, single-parent wing. In an effort to reduce construction costs, and having considered the conditions at the Center jobsite, the architects decided to change the physical design of the dormitories from "H" shaped, single level, slab-on-grade structures, to an "L" shaped, two-story design. This design change rested within the sound discretion of the architect and is not an issue on this appeal. (Tr. 204-05, 257, 312, 451-52, 457-58, 646-47; See also, Finding 9, supra).

27. Among the many items discussed at the 15% review meeting, Putnins raised a question about the number of individuals who would be housed in the female dormitory if

funding for the Add-Alternate were secured. (Tr. 314-16). Putnins and Krois asserted the Job Corps' position that the authorized strength or capacity of the female dormitory could not exceed 120 corpsmembers whether or not the Add-Alternate, single-parent wing was funded. (Tr. 205-06, 214-15, 260, 314-16, 455, 541, 633-34; 827-28).

28. Prior to the 15% review meeting, O'Malley was Kumin's principal contact person with the Contracting Officer. At the meeting, Caperton replaced O'Malley as the project manager. (Tr. 202). Jon Kumin testified that, Troy Caperton, from then on, "was our lead contact, and everything we addressed to the owners went through Troy Caperton..." (Tr. 241). Bannister confirmed: "Everything went through Troy, and we assumed that he was relaying the information along through his boss in turn," including contract changes. (Tr. 301-302).

29. Although O'Malley testified that he believes he advised Kumin at 15% review meeting that he could not issue changes, nor could Krois, nor Caperton, and that only Steenbergen "can authorize you to proceed with those changes," (Tr. 460, 468-69, 543), Jon Kumin did not recall O'Malley specifically raising the question of authority (Tr. 550, 836). O'Malley testified further, however, that: "we walked out of the 15%, that there was a dilemma in what we had asked for in the scope of work, and that we had come to an agreement that the female dormitory would be designed for 96 total females, and 24 single-parents." (Tr. 548; 572-73).

30. After the 15% review meeting O'Malley briefed Steenbergen and the Director of Job Corps. (Tr. 544). Steenbergen denies, however, that he was consulted about the "dilemma" related to the scope of work. (Tr. 785-86). Steenbergen testified that his representative should have, but did not advise him of the "dilemma" which arose at the on-board meeting. (Tr. 785-86).

31. As a result of concerns raised by Job Corps Region 10 officials at the 15% review meeting (Tr. 205, 314), the architect was instructed to design the 120-resident generic structure which would be used for both the male dormitory and female dormitory if funds for the Add-Alternate were not forthcoming, and also to design a 96-resident female dorm with the Add-Alternate single-parent wing housing 24 corpsmembers attached which could be constructed if the Department secured adequate funding. (Tr. 196, 197, 205, 214-15, 258-60, 316-17, 369-71, 421, 455, 515-17, 541, 551, 633-34, 636-40, 643, 705-09; GX 1, pp. 528, 534, 456, 452-52(a), 450, 449).

32. On May 20, 1991, Caperton issued a "directive" to Kumin, which he represented as "approved by DOL on 5/20/91 (O'Malley)," (GX 1, p. 449; See Tr. 367), to implement Job Corps Region 10's requirement that the female dormitory not exceed 120 residents whether or not the Add-Alternate was funded and constructed as an annex to the dormitory. Kumin complied with the directive issued by Caperton as "approved by DOL" and proceeded to design a new structure not in the original scope of work which programmatically would house 96 female corpsmembers and 24 single parents and which would subsequently, at the 60% review meeting, be designated as the Add-Alternate. (See, Finding 44, *infra*). (Tr. 202).

33. Caperton, thereafter, began the process of implementing the Job Corps' requirement both in telephone conversations with Kumin personnel and in his 15% review comments forwarded to Kumin. (Tr. 316; GX 1, pp. 449-552(b); App. Ex. 12, p. 706, 707; Tr. 206, 219).

34. Steenbergen testified that he was not advised or consulted about the "directive" Caperton issued to Kumin (Tr. 789-96). Nor does he recall any mention of design problems at the Palmer Project at his monthly status meetings with DMJM. (Tr. 769, 796).

35. Kumin did not complain in writing about the scope of work "dilemma" raised at the 15% review meeting. (Tr. 268). Bannister, Kumin's Project architect did, however, "discuss" work which he considered beyond the scope of work from the "very beginning...at the on-board review" with Caperton. (Tr. 299, 300; See also. Tr. 365, 657-59, 694).

36. Although Caperton and O'Malley thought that the architect would carry out these programmatic changes without additional compensation (GX 1, p. 416), the architect complained that the programmatic change in the female dormitory/Add-Alternate had a "serious cost impact," (Tr. 232-335; 366-368), and were not merely "design refinements." (Tr. 238-39, 249, 260).

37. Department and DMJM officials denied that any "change" in scope occurred at the 15% review meeting, (Tr. 674-75), acknowledging only that the meeting created a "dilemma" (Tr. 572-73; 752-53) or addressed only "design refinements" (Tr. 238; GX 1, p. 357) or merely "clarified" female corpsmember strength. (Tr. 792).

Kumin and its design contractor, in contrast, viewed the "dilemma" in a somewhat different light. The 15% review meeting resulted in an instruction which required the contractors to

design two different dormitory buildings one of which would house 120 individuals and serve as a prototype for the male and female dormitories in the absence of Add-Alternate funding, and a second dormitory which would house 96 women plus 24 single parents. Jon Kumin testified: "The net result was that at the Job Corps direction we took two complete schemes for [the] female dorms from conception to a hundred percent, although we negotiated for, and are currently being compensated for only one." (Tr. 368. See also, Tr. 320-21). Thus, what Department consultants and officials describe as a "dilemma," design contractors view as a significant change in the scope of work. (Tr. 201, 213, 214-15, 316, 320-21, 369-71).

30% Review

38. On June 25, 1991, the architects timely submitted plans for the 30% review. (GX 1, p. 448(a)). At the time of this submittal, the single-parent wing alone was still designated as the Add-Alternate. (GX 1, p. 422; Tr. 708-09). The architectural plans, however, which the Department approved through DMJM, implemented the instruction to design a 96-resident dormitory with a 24-resident single-parent wing attached. (Tr. 222-24, 465, 708-09).

39. The Board finds that the structural design of the female dormitory changed from the original scope of work as a result of the instruction to change the number of individuals the dormitory would house from 120 to 96 with the single-parent wing attached. The 96-resident dormitory was a different building with different structural configurations, including one wing with a longer wall extending to 112 feet rather than 75 feet. (Tr. 123, 141). One wing of this modified female dormitory was two-stories, while the adjoining wing of the "L" was one story with the single-story Add-Alternate attached. This resulted in different roof designs (Tr. 140, 174-75), different wind and seismic loads (Tr. 120-21), and changes in the location of the mechanical rooms. (Tr. 164).

40. The elimination of the second story of one wing of the female dormitory with the Add-Alternate attached also resulted in the need to add a second mechanical room for the Add-Alternate. (Tr. 51-52). Holmes of RSA explained: "When we lost the second story of the "T" portion of the building, we had to go back in and redesign the plumbing systems, which were no longer two stories but a single story, and the ventilation system to serve the area reduced from two stories to one story, and then the heating system in that area reduced because piping would have to be resized for the lesser load. The electrical changes would entail parallel modifications to delete the second floor..." (Tr.

54-59).

60% Review

41. Kumin timely filed its 60% submittal by September 27, 1991. According to the Contracting Officer, the 60% submission reflected "a misunderstanding by the Contractor regarding what was the base bid to be designed and what had become the add alternative." (Contracting Officers, Br. at 8). Thus, on October 31, 1991, O'Malley, in his capacity as the Government Authorized Representative, forwarded to Kumin, Caperton's review comments on the 60% submittal. (GX 1, p. 354). Caperton advised: "Under the base bid, the Womens Dorm has all four 'pods." The Alternate will be a 3 pod dorm with the single-parent dormitory." (GX 1, p. 356; Tr. 664, emphasis in original).

42. The Board finds that under the scope of work, the Add-Alternate was the single-parent wing. (GX 1, pp. 534-35). The 60% submittal comments reveal that, as a result of programmatic requirements set forth by Job Corps Region 10 officials at the 15% review meeting, the female dormitory not exceed 120 corpsmembers even if it included the single-parent wing, (GX 1, 477; Tr. 734), the Add-Alternate had actually become, not simply the single-parent addition, but the single-parent addition together with the 3 pod, 96 bed female dormitory. (Tr. 229, 232, 234-35; 260, 320-321, 572, 576, 710; See also, tr. 59-60).

43. The major change in direction in the design of the Add-Alternate occurred at the 15% review meeting, (GX 1, 81; Tr. 320-21, 366-68), when the population of the female dormitory with the Add-Alternate changed from 120 members plus 24 single parents to 96 members plus 24 single parents. (Tr. 579). The 96-resident dormitory with the single-parent wing attached, as a whole, was simply not labeled as the Add-Alternate in construction design documents until the 60% review level. (Tr. 710, 267).

44. At the 60% review level, there was no separate plan for the base bid 120-member women's dormitory. The design for the male dorm, still served as the design for the women's dormitory if the Add-Alternate funds were not forthcoming. (Tr. 466, 573, 656, 660, 716).

45. The review comments pertaining to the 15%, 30% and 60% submittals forwarded to Kumin by DMJM through O'Malley who had, by then become the GAR, insured that the programmatic changes set forth by Region 10 officials at the 15% review meeting were implemented. (GX 1, p. 417, 430; p. 354, 356). Copies of the review comments were sent to Steenbergen. (GX 289, 354, 417).

46. On November 5, 1991, Caperton called Bannister to inform him that the design-to budget for the base bid (no alternates) would be raised by approximately \$4 million, to Kumin's estimated cost: that O'Malley and Krois understood the male and female dormitories under the base bid had identical configurations, (GX 1, p. 416; App. Ex. 12, p. 728; Tr. 231-232, 665-666): and that a reply would be forthcoming from Steenbergen, which would address and resolve the concerns raised by Kumin's October 31, 1991, letter regarding a "possible redesign." (GX 1, p. 416).

47. From time to time, O'Malley advised Kumin that design comments Kumin interpreted to be beyond the scope of work should be "discussed" with various DMJM employees. (GX 1, pp. 417, 289). In response, Kumin did not communicate "in writing" with the Contracting Officer (Tr. 269, 273, 275; 651-52), but Bannister did "discuss" the cost impact of the changes with Caperton and O'Malley. (Tr. 232-35, 238-39, 249, 260, 266-68, 299-300; 365, 657-58, 694).

48. On or about January 31, 1992, Steenbergen advised Kumin that the available funding required to proceed with the construction of the Center would be addressed by those parties responsible for the construction, and that the design team's contractual responsibility was to incorporate any additional cost saving alternatives, consistent with the scope of work, into its (final) submittal in an effort to meet the design-to budget. Steenbergen acknowledged his awareness that Kumin's design could result in a construction cost that was over the design-to budget, and he issued a no-cost contract modification revising that design-to budget item to \$12,903,471 for the base bid, \$1,636,534 for the gym, \$916,235 for the child development center, and \$1,143,013 for the single parent cluster, with the latter three budget items to be treated as additive alternates. (GX 1, p. 286).

Final Design

49. On February 3, 1992, Kumin submitted its final design. (GX 1, p. 353a). On February 14, 1992, Kumin's final construction base bid cost estimate was \$13,862,446. Kumin's final total construction cost estimate, including the additive alternates, was \$18,230,502. (GX 1, at Tab 11).

50. By letter dated March 23, 1992, O'Malley forwarded Caperton's final design review comments to Kumin. Caperton advised Kumin that its documents would meet the requirements for

the final submittal in accordance with the Contract when the comments were incorporated into the construction documents. Caperton further noted that Kumin's construction cost estimate of \$13,533,282, not including the alternates (gym, single parent dormitory, and child development center), was still above the design-to base bid estimate of \$12,903,471, but well below the increased available funding of \$15,202,633. (GX 1, p. 353a).

51. Caperton also commented regarding Kumin's construction cost estimate that it "still does not reflect a full 4 pod womens dorm in the base bid." (GX 1, p. 293). In addition, O'Malley noted that the issuance of the Invitation For Bid, ("IFB") for construction of the Palmer Project was tentatively scheduled for April 15, 1992. (GX 1, p. 289).

52. Following timely issuance of the IFB, the bid opening was held on May 28, 1992. E & E Construction was the low bidder at \$13,550,000. Its bid with the Add-Alternates was \$18,085,300. E & E Construction was subsequently awarded the construction contract and the Project was completed within budget and available funding. (App. Ex. 13; Tr. 356).

53. In June 1992, O'Malley advised Kumin to raise with Steenbergen the question of the change in the scope of work regarding the female dormitory. (Tr. 468). On the fifth and thirteenth of January, 1993, and again on October 27, 1993, Kumin requested an equitable adjustment in the amount of \$84,154 (GX 1, pp. 77-79; 68-76; 63-65) which the Contracting Officer finally denied on December 14, 1993 (GX 1, p. 59-60).

54. The problem detected by Region 10 Job Corps officials at the 15% review meeting regarding the capacity of the female dormitory with the Add-Alternate is variously described by the Contracting Officer and his representatives as a "purported change" (Steenbergen, Tr. 768); a "dilemma" (Steenbergen, Tr. 782-84); O'Malley, Tr. 548, 573); (Caperton, Tr. 633-34, 752-53), a simple clarification of strength (Steenbergen, Tr. 792), "different configuration" (Tr. 712), and "design refinements" (Tr. 238, GX 1, p. 357). The Department denies that a change in the original scope of work occurred. (Steenbergen, Tr. 804, Caperton, Tr. 674-75).

55. The Board finds that the Department directed a change in the programmatic requirements of the female dormitory, communicated to Kumin through Caperton, which required the architect to design a 96-resident female dormitory with attached 24 single-parent wing, and that directive constituted a design change from the scope of work set forth in Contract 99-1-4907-14-032-01, which required a 120-resident female dormitory, with an

Add-Alternate capacity of a 24 single-parent wing to be added if funding were available.

Quantum

56. The contract provides that the contractor shall be paid a "firm-fixed price". (GX 1, p. 561). While the Contractor may receive additional funds for extra work ordered through the Government's direction, it must show that a change occurred which obligates the Department to pay the Contractor for its additional work. The contract expressly provides that "design services for work beyond that which is outlined in Part I - the Schedule, Section A - Statement of Work" are not considered as part of this agreement and must receive prior authorization by the Contracting Officer and will be paid for at a fee to be negotiated." (GX 1, p. 592). FAR 52.243-7(e) provides for equitable adjustments under the Notification of Changes clause. (GX 1, p. 668). The Contractor asserts that it had such prior authorization. (Tr. 202).

57. As previously noted, on or about January 5, 1993, Kumin submitted its claim for equitable adjustment in the amount of \$84,154, for design costs incurred by Kumin, Tryck Nyman, and RSA in changing the plans for the Add-Alternate female dormitory design. The costs associated with the change were set forth as follows:

Kumin @ 536 hrs at a combined rate of \$54.22/hr	\$29,061
RSA @ 469 hrs at a combined rate of \$53.40/hr	\$25,045
Tryck Nyman @ 473 hrs at a combined rate of \$63.50/hr	<u>\$30,048</u>
TOTAL CLAIM AMOUNT	\$84,154

(GX 1, pp. 77-79)

58. In support of the claim, Bannister explained that the differences between the male dormitory and female dormitory which arose as a result of changes in the female dormitory limited the potential to use auto-CAD, and required new drawings to accommodate the female dormitory changes, including different room sizes, corridor sizes, walls, mechanical room location, stairs, and fan room location. (Tr. 287-90). He further explained that while the original female dormitory design required modifications to annex the Add-Alternate, if funded, and were included in the original scope of work, the design modifications ultimately necessitated by the changes in

configuration of the female dormitory were substantially more extensive than contemplated by the original scope of work. (Tr. 290, 839-40, 842-44).

59. Caperton disputed Bannister's assessment of the design complexities the changes entailed. Caperton compared the 120-resident dormitory with the 96-resident dormitory and concluded that significant cost savings could have been achieved in designing the 96-resident dormitory by use of the design of the 120-person dormitory. (Tr. 669). He testified he would have simply designed one building plan up to point it diverged from the second building, copy it, and then make the modifications on the copied plan. (Tr. 669, GX 5).

60. Caperton found similarities in the first floor dormitory plans in the core areas, room sizes in the first three bays or four-person rooms on the east side corridor, the handicapped accessible room, identical wall and window sections, ceiling plans, and similar door schedules, mechanical and electrical details. (Tr. 669-70). Differences included the end conditions, stair details which could be "similar," and mechanical room changes due in part to the need to attach the Add-Alternate. (Tr. 672).

61. On the other wing, Caperton observed that the first three bays off the common lounge were the same, the lounge and study areas are the same. (Tr. 672). A four-person room became a two-person room on one wing and a fan room was added. (Tr. 673). The removal of the second floor of one wing on the female dormitory necessitated roof changes, but the addition of the Add-Alternate would have, Caperton contended, necessitated some roof changes even under the original scope of work. (Tr. 673-74).

The men's dormitory, however, had four clusters of seven rooms with four beds each and one room with two beds, while the changed female dormitory had three clusters of eight rooms each containing four beds. (Tr. 706). Thus, the clusters for the dorms had different configurations. (Tr. 706). From an architectural standpoint, changes in the number of individuals a room is programmed to house changes the design input. (Tr. 739-740).

According to Caperton, the changes involve simply erasing a couple of lines and adding a couple of lines. (Tr. 741-42). For the electrical design, Caperton suggested that he would design the male dormitory first and simply erase the top floor of one wing for the 96-resident female dormitory and "make some changes." (Tr. 745-46). Caperton acknowledged, however, that despite these similarities between the generic dormitory and the

female 96-resident dorm, "It would be extremely difficult to figure out what cost savings could have been realized," in designing the two structures. (Tr. 674).

62. O'Malley testified that the change in the female dormitory to a 96 resident dormitory required redesign to "a limited capacity," (Tr. 609), but in his opinion many similarities between the male and female dormitories still existed, allowing use of CAD, (Tr. 612). Still, O'Malley acknowledged the need for extra design work did arise. (Tr. 610-11). He noted that differences in the square footage of the male and female dormitories, (Tr. 611) and differences in the number of individuals each was designed to house, for example, were among the changes which altered the economies of design which could have been achieved if the Add-Alternate had not been changed. (Tr. 611-612; 669).

63. Bannister disputed as overly simplistic the Caperton/O'Malley assessments of the amount of work the ordered change entailed. Bannister observed: "Essentially we started developing an entirely new building. We continued working on the male dormitory, and then we continued working on the female dormitory, which at that point was a completely different building, different number of rooms, different configuration as far as the commons area, different stories. It was a different building that we were simultaneously developing at the same time as the male dorm, and we continued doing that all the way throughout..." (Tr. 838).

64. The record shows that Kumin did not maintain records which would demonstrate the actual amount of time devoted to the extra work or the itemized costs incurred due to the changes in the female dormitory. (Tr. 286, 291; 304-05). Kumin estimated its additional costs attributable to the change. (Tr. 305). The estimate, in turn, was based upon a number of factors. Bannister first obtained records showing the total costs attributable to the architects assigned work on the project, and then separated the work he attributed to the female dormitory. (Tr. 248). He did not include any of his own time or Jon Kumin's time in his total (Tr. 322). He requested and obtained similar information from RSA and Tryck Nyman. (Tr. 248).

65. Kumin had assigned architects Mary Cary and Monique Prozeralik to design the dormitories. Bannister obtained the total time spent on these dormitories, then allocated one-third of the architects' time to the 96-resident female dormitory at their composite rate (Tr. 250; App. Ex. 14; Tr. 285-86; Tr. 322-23). Because the male dormitory and the single-parent wing were in the original scope of work, he attributed two-thirds of the

architects' work to those structures. Bannister testified that the fact that the female dormitory accounted for approximately 40% the total square footage of these three structures was also a factor he considered. (Tr. 248; 286).

66. Ordinarily, a sheet of architectural drawings represents 40 to 80 hours of work, depending upon the complexity of the sheet. (Tr. 351, 377, 388). The two separate configurations of the female dormitory necessitated the preparation of 10 extra architectural sheets at a composite rate of \$2900 per sheet. (Tr. 351-52, 357, 376-77). In this instance, Bannister's estimate of the number of hours of extra work to design the female dormitory, as changed, involved ten sheets at \$2900 a sheet. At a composite rate of \$70 an hour, that amounted to approximately 40 hours a sheet. (Tr. 378). Bannister's estimate of \$29,064 as the cost of extra work was consistent with the number of sheets produced and the estimated cost per sheet, (Tr. 357), but was slightly less than an estimate based upon a percentage of the total square footage of the female dormitory. (Tr. 357).

67. While Kumin's original fee was negotiated on the basis of hours, the number of estimated sheets of drawings a job may require is a recognized method architects employ to test the accuracy of the assumptions about the number of hours a project will require. (Tr. 377).

68. For the total design team, redesigning the female dormitory from 120 residents down to 96 residents required approximately 25 new sheets. (Tr. 381). Jon Kumin testified that total hours for the 10 architectural sheets was estimated at 536 hours or 53.6 hours per sheet. (Tr. 382, GX 1, p. 79), which, as a cross-check, differed with Bannister's estimate. As a result of economies achieved from the design of the generic-dormitory, however, Kumin anticipated that number of hours would fall within lower portion of the 40 to 80 hour per design sheet range normally expected. (Tr. 382,388; See also, Finding 67 supra). The reason the hours per sheet estimate tends toward the low end of the range is attributable to efficiencies in applying some of the work on the male dormitory to the new female dormitory. (Tr. 389).

69. In addition, Kumin calculated that extra design work involved approximately 15,000 square feet at a construction cost of about \$100 per square foot. This would yield a construction cost of about \$1.5 million based upon which a 6% design fee would amount to about \$90,000. (Tr. 383). As a further cross check, Kumin ordinarily expects its fee to represent about 40% of the total design fee, (Tr. 384) with civil, structural, electrical,

mechanical and other design fees accounting for the remaining 60%. (Tr. 385). Applying these factors, Kumin was satisfied that the estimate of \$29,061 for architectural design was fairly close to and consistent with the estimates provided by RSA and Tryck Nyman. (Tr. 385-86).

70. Jon Kumin testified:

"There was excellent correlation between checking this a number of ways, and when there's excellent correlation between checking this, estimating in a number of ways, I have a lot of confidence that the number is right, and that is based upon something like 18 years of putting fee proposals together, monitoring how many hours we actually spend against how many hours I've estimated, and over the years you develop a pretty accurate ability to estimate. If you don't, you will not be in business." (Tr. 390).

71. Kumin's methodology of estimating design costs, using cross-checks, industry percentages, comparisons of the estimates of the various design disciplines such as electrical, mechanical, and structural, drawing sheets and hours, follow general industry guidelines and was confirmed as appropriate by O'Malley. (Tr. 420-21, 507-08, 612-14). O'Malley further confirmed that Kumin's record and timekeeping methods were also consistent with the industry standards. (Tr. 558).

72. While a forward price estimate would have been considered by the Contracting Officer at the time the directive to change the female dormitory was issued to Kumin after the 15% review meeting, (Tr. 502-04, 568-69; 772), the Contracting Officer rejects the notion that estimates of hours attributable to a change is an appropriate basis for apportioning costs after the change has been implemented. (Tr. 779-80; 568-69; 580-82).

73. Jon Kumin discussed the feasibility of attempting to track precisely the hours associated with a change of this type:

We're not like attorneys who normally document our time in ten-minute slices. We are not set up to do that.

The way we typically document our time is in broader issues. If you look at the way you put a set of contract documents together, you're bringing in elements from all over

the place.

When Mary Carrie (sic) and Monique Proserelic (sic) were working on these jobs, there might be a wall section that could be used for more than one element, for example. The savings from that were already reflected in our fee. If we didn't have the ability to do some of this commingling, if you will, our fees would have been higher. But what that commingling does, it not just saves you money, it also means it's more difficult for us to precisely identify and track all of those pieces of time." (Tr. 372).

74. The record shows that RSA's bid was based on the original scope of work which described the male dormitory and the female dormitory as identical designs. (Tr. 107). As a result of the change in the female dormitory, mechanical engineer Holmes testified that RSA "assumed a certain amount of hours because of the requirement to design a different female dormitory from the male dormitory. In our fee negotiations we assumed two identical dorms with a single-parent wing. What we ended up doing was one dormitory of 120, a complete separate dormitory of 96, and then the 96 plus the single-parent." (Tr. 84-86, 90, 107-08).

75. In terms of additional design work, the record shows that RSA was not able to use the entire mechanical design of the male dormitory without significant changes for the 96 person female dormitory. (Tr. 91). Design changes in the mechanical room were necessary to eliminate the boilers in the single-parent wing. (Tr. 92). This resulted in construction cost saving, but increased design costs. (Tr. 92). In addition, piping for plumbing and heating had to be resized, and duct work revised, (Tr. 92), because the second floor of one wing had to be removed to accommodate the reduction from 120 to 96 female residents. (Tr. 93).

76. After July, 1991, during the design phase, RSA kept track of its work on the female dormitory including the single-parent wing under Project No. 9140.07. (Tr. 67). RSA reviewed all of the time cards to determine that it spent a total of 703 hours on the female dormitory. (App. Ex. 4, Tr. 68; Tr. 69). RSA then determined the negotiated rates for the individuals who spent time on the female dorm project, (Tr. 69) and prepared a spreadsheet which identified the individuals, and the hours spent on Project No. 9140.07. (Tr. 69-70).

77. RSA had no separate breakdowns for the female dormitory and the single-parent wing. (Tr. 70). It determined from its original estimate that the single-parent wing was calculated at about one-third the total square footage of the dormitory, and would take approximately one half as much time to design as the main female dormitory. (Tr. 71). RSA did not, however, determine precisely the number of hours directly attributable to the change requiring the design of the 96-resident female dormitory. (Tr. 84, 89, 109). Rather, in estimating the cost of the change, RSA estimated that one-third of the hours would have been spent designing the separate wing and two-thirds devoted to the design of the 96 resident female dormitory. (Tr. 71).

78. In bidding a job, RSA estimates that electrical design is approximately 60% of the time estimated for the mechanical design work. (Tr. 103-04).

79. Considering the negotiated fee, and its estimated hours to accomplish the change directed in the female dormitory after the 15% review meeting, RSA calculated the cost of its share of the extra work at \$25,045. (GX 1, p. 79).

80. Tryck Nyman was also guided by the written scope of work in arriving at its fee for civil and structural design phases of the work at the Palmer Center. (GX 1, p. 534; Tr. 113-16). Relying upon the scope of work, it anticipated in formulating its bid that the female dormitory would be "a carbon copy of the male dorm" (Tr. 116).

81. The decision to reduce the female dormitory from 120 to 96 residents necessitated reducing one of the dormitory wings from two stories to one story. This altered configuration of the single story wing produced a shear wall factor different from the two story design of the male dorm. As Tryck Nyman engineer Smith explained, the shear wall change was an important factor in the lateral design because it "resists the threat of lateral forces from wind and earthquakes." (Tr. 117).

82. The Anchorage/Palmer Alaska area is a seismic zone four region and ranks among the nation's most critical of the seismic lateral force design zones. (Tr. 117). In addition, the city of Palmer lies close to the Matanuske and Knik Glaciers resulting in wind loads which exceed 100 miles per hour. In such areas, in buildings such as dormitories occupied twenty-four hours a day, connection design is both extremely important and labor intensive. (Tr. 117).

83. The changes from a generic 120 resident dormitory to a 96 resident dorm with a single-parent wing attached resulted in a

structure longer and lower on one wing, with a different interior design such as a change in the location of the mechanical room. (Tr. 123, 126). These changes required additional structural design calculations beyond those needed for the generic 120-resident dormitory.

84. From a structural design standpoint, the 96 resident female dormitory was no longer the generic 120-resident dormitory described in the scope of work, but a "different building altogether." (Tr. 128, 134; (App. Ex. 8, 9). Tryck Nyman would have been able, whether the buildings were single story "H" shaped structures or two story "L" structure, to design one 120-resident dormitory and produce the second 120-resident dormitory under the scope of work essentially by electronic means using auto-CAD drafting. The design changes necessitated by the reduction in the number of residents the female dormitory would be permitted to house if the Add-Alternate were funded, vitiated many of the efficiencies Tryck Nyman anticipated from the use of auto-CAD in designing the female dorm. (Tr. 130, 154, 156; App. Ex. 8).

85. Tryck Nyman did not maintain specific records documenting the precise costs it incurred as a result of changes in the design of the female dormitory. It did, however, maintain a computer generated spreadsheet of the cost of each building, correlated with its personnel timecards for its engineers, drafters, and secretaries at their respective composite rates of \$90, \$70, \$55, and \$30. (App. Ex. 11; Tr. 135-36, 169; GX 1, p. 56).

86. At an estimated cost of \$2,504 per structural drawing sheet, Tryck Nyman estimated approximately 6 design sheets for the generic 120 resident female dorm with single-parent wing and approximately 13 additional design sheets for 96-resident dorm with single-parent wing. (Tr. 155-56). Tryck Nyman had budgeted \$14,844.13 to design the female dormitory with single-parent wing as described in the scope of work, but calculated total costs amounting to \$45,072.87 in drafting the civil and structural designs for the female dormitory as changed to a 96-resident dormitory with attached single-parent wing attached. (App. Ex. 11; Tr. 136). In discussions with Bannister, Tryck Nyman subsequently agreed the single-parent wing constituted one third of the cost the design with two thirds of the total calculated costs attributable to changes in the female dormitory. It thus claimed \$30,048 as a consequence of the changes. (Tr. 137).

87. In summary, the design impacts of the directive to reconfigure the female dormitory were evaluated by Bannister:

When we negotiated the contract, if we would have only had to do one building, we would essentially had identical plans sitting here with just the single-parent wing coming off one side. There would have been some minor modifications right where the wing attached, but it would have been an identical building. We now have two buildings that are not the same. The male dorm and the female dorm are not the same buildings....There are some like similarities, and some of the rooms have four people and that type thing, and the basic configuration of the corridor as we've tried to maintain. But essentially it's a separate building....(Tr. 213-14).

Essentially we had an entire new set of drawings just for the female dorm which we would not have had to produce before. Our final set showed ten drawings just for the female portion, which would not have had to have been done before. Likewise, with that now our consultants had to do the exact same thing. They had a whole new set of drawings just for this female wing, this female dorm configuration. (Tr. 215; see also Tr. 320-21).

DISCUSSION

I.

CERTIFICATION OF CLAIM

Although not raised as an issue at the hearing, the Contracting Officer, in his post-hearing brief, claims that the Board does not have jurisdiction to decide this case, because Kumin did not properly certify its claim in accordance with the Contract Disputes Act of 1978, 41 U.S.C. § 605(c)(1).² The

²The United States Court of Appeals for the Federal Circuit has observed that "[w]hile contractors might be well-advised to use the precise language of the [Contract Disputes Act], the government is not well-advised to challenge every deviation, no matter how slight, meaningless, or harmless." Heyl & Patterson,

Contracting Officer contends that Kumin's certification failed to state that the "certifier is duly authorized to certify the claim on behalf of the contractor."³ On November 2, 1993, Jon Kumin provided the following certification:

By this letter, we are certifying that this claim is made in good faith and that the supporting data are accurate and complete to the best of our knowledge and belief. The amount requested accurately reflects the contract adjustment for which we believe the Department of Labor is liable.

The Board finds Kumin's certification statement sufficient to satisfy the jurisdictional prerequisites necessary to entertain this appeal. The certification provision in effect in November, 1993, did not require Jon Kumin to state that he was duly authorized to certify the claim on behalf of Kumin. As the Contracting Officer correctly contends, the certification requirements of the Contract Disputes Act were amended on October 29, 1992, to include the omitted language. The amendment, however, applied to "certifications executed more than 60 days after the effective date of amendments to the Federal Acquisition Regulations implementing the amendments . . . to the certification of claims." Pub.L. 102-572, § 907(a)(4). The Federal Acquisition Regulations were amended on October 25, 1993. 58 Fed. Reg. 5724-01. Consequently, the amended certification provisions upon which the Contracting Officer relies applied to certifications executed after December 25, 1993, and not to this certification executed on November 2, 1993.

Applicable provisions in effect on November 2, 1993, required certification that "the claim is made in good faith," that "the supporting data are accurate and complete to the best of the Contractor's knowledge and belief," and "the amount requested accurately reflects the contract adjustment for which the Contractor believes the Government is liable." Kumin's certification fully complies with the certification provisions of the contract and the Contract Disputes Act in effect in November, 1993. The Board, therefore, has jurisdiction to decide this appeal.

II.

The Contract is not Ambiguous

Inc. v. O'Keefe, 986 F.2d 480, note 1 (Fed. Cir. 1993).

³Jon Kumin, as managing principal of Kumin, was a proper person to certify Kumin's claim.

Appellant claims that the Contracting Officer constructively changed the original scope of work and increased costs when it directed the architect/engineer to design a 96-resident female dormitory, instead of a 120-resident female dormitory, with an attached wing capable of housing 24 single parents and their children. Appellant, therefore, seeks an equitable adjustment covering costs it contends were incurred as a consequence of the constructive change. The Contracting Officer, in contrast, contends that the directive to reduce the number of residents the female dormitory would house if the Add-Alternate were funded is a mere clarification of an ambiguous scope of work rather than an order effecting a contract change. The Board concludes that the Department did indeed constructively change the scope of work, and that Appellant is entitled to an equitable adjustment.

The Contracting Officer claims that the scope of work was ambiguous to the extent that one clause indicated the maximum capacity of the Center would be 240 persons, while other provisions of the contract required Kumin to design residential space for 264 persons. The provision upon which the Contracting Officer relies states: "[a]s proposed, the New Job Corps Center, located in Palmer, Alaska, will provide training for an authorized strength of 240 resident corpsmembers (120 male and 120 female)." Upon consideration of the contract as a whole, the Board concludes the term "as proposed" refers to the Palmer Project, as funded at the time of the issuance of the IFB and indicates that the Center, as then funded, would have a residential strength of 240 persons. Nothing in that clause indicates that the authorized strength was fixed regardless of funding and would not or could not be increased if additional funding became available to construct the Add-Alternate with the added Project capacity of twenty-four corpsmembers.

Under the original scope of work set forth in the Contract as bid, the Add-Alternate provided additional space for 24 additional corpsmembers and was simply attached to the generic dormitory. As a result, in calculating the square footage of the female dormitory, the square footage of the single family wing was added to the square footage of the generic 120-person dormitory. The original scope of work contemplated no reduction in the resident population of the female dormitory if funding for the single-parent wing became available, and, in such event, it contemplated no corresponding reduction in square footage of the female dormitory. In contrast, when the resident population of the female dormitory was reduced to 96 by what we find to have been a constructive change, a corresponding reduction in the square footage of that structure was accomplished by the removal of the second floor of one wing.

The provisions of the original scope of work, when read together are, therefore, entirely consistent with the original interpretation of Appellant, its subcontractors, and government witnesses, including the drafter of the scope of work specifications, that the authorized residential strength of the Center would be 240 in the event funding did not materialize for the single-parent wing, and that the authorized residential strength of the Center would be 264 in the event funding was approved for the single-parent wing. We, therefore, hold that the original scope of work defined in the Contract is not ambiguous.

III. Constructive Changes

This Board has held that where the Department interprets a contract to require a contractor to perform additional work not contemplated in the contract as written, the Department's interpretation constitutes a change to the contract, and the contractor is entitled to an equitable adjustment. The Steinberg Group, LBCA No. 93-BCA-6, ___ BCA ¶ ___; see also Die-Matic Tool Co., ASBCA No. 31185, 89-1 BCA ¶ 21,342; Franklin Pavkov Const. Co., HUDBCA Nos. 93-C-C13, 93-C-C14, 94-3 BCA ¶27,078. Where the Department orders a constructive change to the contract, it must compensate the contractor for that change. Aydin Corp. V. United States, 61 F.3d 1571 (Fed. Cir. 1995). To recover for a constructive change:

[A] contractor must show that: "The Government's representative, by his words or deeds, must require the contractor to perform work which is not a necessary part of his contract. This is something which differs from advice, comments, suggestions, or opinions which Government engineering or technical personnel frequently offer to a contractor's employees."

Space Services of Georgia, Inc., ASBCA No. 25793, 81-2 BCA ¶15,250, citing Industrial Research Associates, Inc., DCAB No. WB-5, 68-1 BCA ¶ 7069.

In the present case, the original scope of work clearly and unambiguously required Kumin to design a generic dormitory to house 120 persons, which would be used for both a male and a female dormitory, and one single-parent wing with 24-studio apartments, which, if funding became available, would be attached to the generic 120-person female dormitory. The office of the Contracting Officer and the Region 10 Job Corps representatives received for review and approved the scope of work provisions before they were published for bids.

At the 15 percent design meeting, the Region 10 Job Corps officials advised participants that the maximum residential strength of the Job Corps Center would be 240 persons, inclusive of the single-parent wing. This determination was contrary to the original scope of work, since it reduced the maximum residential strength of the Job Corps Center with the single-parent wing from 264 persons, if funding for the single-parent wing became available, to 240 persons, and thereby vitiated use of the generic 120 resident dormitory design for the female dormitory with the add-alternate single-parent wing, as originally contemplated. Caperton, as DMJM's Project Manager, and acting at O'Malley's direction, telephoned Kumin and directed Kumin to design a 96-person female dormitory with the 24-apartment single-parent wing attached. Caperton represented to Kumin that the directive was "approved by DOL per O'Malley." This directive is memorialized in the May 20, 1991 Telecon Report signed by Caperton.

This May 20, 1991 directive, in effect, required Kumin to design not two generic buildings as originally proposed, but three buildings; a generic 120-person dormitory, a 96-person dormitory, and a 24-apartment single-parent wing to be attached to the 96-person dormitory. While some elements of the 120-person generic dormitory could be used in designing the 96-person dormitory, the change required the two dormitories to have different roof designs and different mechanical, electrical, and structural designs. These differences required significant redesign work. Thus, the Department clearly required Kumin to perform work which was not included in the contract as written.

IV.

Authority to Direct Change

To establish entitlement to an equitable adjustment for the constructive change in the contract, Kumin must establish that the change was ordered by an authorized representative of the Department. The Department argues that the change was not duly authorized, because the Contracting Officer did not approve it.

We are mindful that unauthorized acts of its agents certainly will not bind the Department, and the Contractor acknowledges that a Department representative must have actual authority to order a change in the contract. Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947). Actual authority, however, need not be express, and may be implied from the totality of circumstances indicative of the relationship between the parties. H. Landau & Co. v. United States, 886 F.2d 322 (Fed. Cir. 1989); DOT Systems, Inc., DOTCAB No. 1208, 82-2 BCA ¶15,817; Contractors Equipment Rental Co., ASBCA 13052, 70-1 BCA

¶8183; Urban Pathfinders, Inc., ASBCA No. 23134, 79-1 BCA ¶13,709; see also Reliable Disposal Co., ASBCA No. 40100, 91-2 BCA ¶ 23,895. Actual authority to bind the Government will be implied when the exercise of such authority is an integral part of the duties assigned to the government's agent. H. Landau & Co., supra.

For example, in DOT Systems, Inc., supra, the Department of Transportation contracted with DOT Systems to provide warehouse space for government-owned exhibits. At a post-award meeting, the Contracting Officer advised DOT Systems that the Contracting Officer's Technical Representative ("COTR") lacked authority to change the contract, but had authority to direct activities in the warehouse, including the method of storage of the exhibits. A dispute arose when DOT Systems sought to store the exhibits without providing aisle space. Although the contract did not require the Contractor to maintain aisle space between the exhibits, the COTR ordered it to maintain aisle space.

The Department of Transportation Board of Contract Appeals held the maintenance of aisle space constituted a constructive change to the contract, and that the COTR had the implied authority to order the change, despite an express statement to the contrary by the Contracting Officer. The Board found that the Contracting Officer gave the COTR broad discretion to direct operations in the warehouse, and DOT Systems looked to the COTR, not to the Contracting Officer, for direction in performing the contract. The Board observed, "where the contract or the Contracting Officer licenses technical personnel to give guidance or make decisions under the specifications, the government is liable for the consequences of the action taken." DOT Systems, Inc., at 78,386, citing, Max Drill Inc. v. United States, 192 Ct. Cl. 608 (1970), Centre Mfg. Co. v. United States, 183 Ct. Cl. 115 (1968), General Casualty Co. v. United States, 130 Ct. Cl. 520 (1955), Wisner and Becker Contracting Engineers, DOTCAB No. 76-24, 78-1 BCA ¶ 13,199, and Tasker Industries, Inc., DOTCAB No. 71-22, 75-2 BCA ¶ 11,372.

In a similar case before the Armed Services Board of Contract Appeals, the Air Force contracted with Contractor's Equipment Rental Company ("CERCO") for the rental of heavy equipment for training purposes. The Contracting Officer introduced the Engineering Squadron Commander to CERCO, and stated that the Commander was the "man to satisfy" during performance of the contract. The Commander determined the equipment needs of the Air Force and whether the equipment provided by CERCO satisfied those needs.

During the course of contract performance, the Commander

ordered several substitutions and modifications to the equipment enumerated in the contract. The Armed Services Board of Contract Appeals held that the Commander's substitutions and modifications constituted constructive changes, and that the Contracting Officer's delegation of authority to the Commander was "tantamount to a delegation de facto as the [C]ontracting [O]fficer's authorized representative," and the Commander had the implied authority to order the substitutions and modifications. Contractors Equipment Rental Co., ASBCA No. 13052, 70-1 BCA ¶8183; See, Hudson Contracting, Inc., ASBCA No. 41023, 94-1 BCA ¶26,466 ("The contracting officer had allowed Mr. Semmes to exercise broad authority as to contract administration in his own name and position. . . . Mr. Semmes' agreement to the transaction would, therefore, be binding on the Government.")

In this instance, the record shows that Steenbergen, in his capacity as the Contracting Officer, had little day to day involvement with the administration of the contract. He delegated significant contract administration authority to O'Malley, as the Government Authorized Representative, and Caperton, as the DMJM Project Manager. The contract did not designate a Specifically Authorized Representative, but designated Al Stith as the authorized representative of the Contracting Officer. Although the contract never designated O'Malley as the Government Authorized Representative, O'Malley represented to all parties that he was the Government Authorized Representative. As the Government Authorized Representative, O'Malley acted on behalf of Steenbergen. O'Malley represented Steenbergen at meetings with Kumin, interpreted the scope of work, and determined whether Kumin's submissions satisfied the requirements of the contract. We, therefore, conclude that O'Malley was the de facto Government Authorized Representative.

In this case, O'Malley, on behalf of the Department, communicated DOL's approval through Caperton of a directive to Kumin to design a 96-person dormitory with the 24-apartment single-parent wing attached.⁴ The record does not indicate that

⁴The Department issued other design refinements through Caperton in much the same way that it issued the May 20, 1991 directive. For example, Caperton, in early May 1991, orally directed Kumin to design the 96-person dormitory as a three cluster structure of three, four-person rooms and four, five-person rooms. The May 20, 1991 directive ordered a change to that structure by eliminating the five-person rooms for both the male and female dormitories. In his 60% design review comments, Caperton also directed Kumin to design the add-alternative to the 96-person dorm with the single-parent wing attached.

O'Malley had a contracting officer's warrant. Furthermore, O'Malley claims to have told Kumin, at the 15% design meeting, that he did not have the authority to issue changes. However, the evidence does not conclusively establish that O'Malley made the disclaimer. Nor do the terms of the contract expressly confer such authority upon him. Yet, whatever limitations to his authority O'Malley may have felt compelled to disclose at the 15 percent meeting, he subsequently represented that he was acting within the bounds of his authority when he issued the May 20, 1991 directive via Caperton.⁵

We note further that Caperton, in his capacity as consultant to the Contracting Officer, presumably was familiar with the lines of authority within Steenbergen's office, and was apparently satisfied that O'Malley's authority to issue the directive was sufficient to warrant his own involvement as the intermediary who communicated the instruction to the Contractor and subsequently served to ensure Contractor compliance with it. Kumin, moreover, clearly acted reasonably in complying with the directive when Caperton represented the directive as "approved by DOL."

We conclude that O'Malley had a broad de facto delegation of authority to administer the contract and had implied authority to order the change. The Department is, therefore, bound by the directive to the architect ordering the design of a 96-person dormitory with a 24-apartment single-parent wing.

V. Ratification

Furthermore, were we to conclude that O'Malley lacked the implied authority to change the contract, there is compelling evidence that Steenbergen, nevertheless, ratified the change order. Ratification will be found where an authorized "government official has actual or constructive knowledge of a representative's unauthorized act and expressly or impliedly adopts the act." Parking Company of America, Inc., GSBGA No. 7654, 87-2 BCA ¶ 19,823, citing Williams v. United States, 130 Ct.Cl. 435, 127 F.Supp. 617, cert. denied, 349 U.S. 938 (1955),

⁵Caperton's authority is not at issue because Caperton was merely conveying a directive authorized by the Department through O'Malley. While O'Malley communicated the order, we cannot determine based on the present record whether O'Malley originated the directive or merely conveyed to Caperton the authorization of another DOL official whom O'Malley accepted as having authority to authorize the change.

W. Southard Jones, Inc., ASBCA No. 6321, 61-2 BCA ¶ 3192;
Reliable Disposal Co., supra.

The evidence in this record shows that the Contracting Officer approved the Scope of Work which called for a 120-person generic dormitory design and one 24-apartment single-parent wing to be attached to the female dormitory. Although not a participant in the design review meetings, the Contracting Officer received copies of the 30%, 60%, and 100% design review comments. Caperton's design review comments relative to Kumin's 60% submission stated "[u]nder the base bid, the women[']s dorm has all four 'pods'. The alternate will be a 3 pod women[']s dorm with the single parent dormitory." (Emphasis in original.) The change from the original scope of work, and the additional design requirements were clearly manifest in these design review comments.

The evidence further shows that O'Malley briefed Steenbergen following the 15 percent design meeting. Participants testified that the meeting at which this briefing took place virtually came to a halt until Region 10's concerns about the female dormitory resident strength were resolved. We find it difficult to accept the notion that a matter of such basic importance, raised by the Regional Administrator of Region 10 Job Corps and his Deputy, was not discussed with Steenbergen. Thereafter, DMJM held monthly briefings with Steenbergen regarding the status of the Project. During the course of these briefings, Steenbergen should have been briefed on the design changes that were ordered by O'Malley as a result of the 15% review meeting.

The review comments Steenbergen received were sufficient to alert him to the change. Even if crucial information regarding the change in the scope of work might not have been actually conveyed to Steenbergen, knowledge of the changed scope of work may be imputed to him, where, as here, he delegated such significant contract administration duties to O'Malley, and O'Malley clearly had actual knowledge of the change as manifested by O'Malley's direct involvement with the contract administration. See, Midwest Environmental Control, Inc., LBCA No. 93-BCA-12, ___ BCA ¶ ___; Burn Construction Co., IBCA No. 1042-9-74, 78-2 BCA ¶ 13,405. It is clear from the record that O'Malley had actual knowledge of the design change, and we have found that Steenbergen broadly delegated contract administration duties to O'Malley. We, therefore, find the Contracting Officer had constructive, if not actual, knowledge of the change to the scope of work.

To the extent the Contracting Officer knew or should have known of the change, and took no action to countermand the

directive issued by O'Malley via Caperton,⁶ his silence or inaction constitutes ratification. Parking Company of America Inc., supra; Coalition for United Community Action, Inc., LBCA No. 85-BCA-2, 87-2 BCA ¶ 20,290; Williams v. United States, supra (the ratifying official's constructive notice coupled with silence amounted to ratification.) Under clause 52.243-7(c), the Contracting Officer had an obligation to repudiate the unauthorized acts of the Government Authorized Representative. We hold on this record that the Contracting Officer had constructive notice of the change and failed to repudiate O'Malley's directive to Kumin to design a 96-person dormitory with a 24-room single-parent wing attached. As a consequence under these circumstances, we hold that the Contracting Officer ratified O'Malley's directive.

The Contracting Officer argues that Kumin is not entitled to an equitable adjustment for the constructive change to the contract's scope of work, because Kumin did not provide notice of the constructive change in accordance with the notice provisions contained in clause 52.243-7 of the contract. We find the argument to be without merit. At the 15 percent design meeting on April 30, 1991, Kumin's personnel orally advised Caperton that Kumin considered the additional design work beyond the contract's scope of work.

This Board recently observed that the notice requirement will be construed very liberally where the Contracting Officer has actual or imputed knowledge of the pertinent facts, or where the lack of notice was not prejudicial to the Contracting Officer. Midwest Environmental Control, Inc., supra; See also, Watson, Rice & Company, HUDBCA No. 89-4468-C6, 90-1 BCA ¶ 22,499. In Midwest, we addressed a situation strikingly similar to the case before us. The Contracting Officer in Midwest delegated significant contract administration duties to consultants and technical personnel. The Contracting Officer, in that case, attempted to argue that the Contractor could not recover for a constructive change because it had failed to provide notice of the constructive change directly to the Contracting Officer. We found that the Contractor did provide the requisite notice to those officials charged by Contracting Officer with contract administration duties, and that the Contracting Officer was not prejudiced by the lack of personal notice. We stated that "[t]he Contracting Officer cannot insulate himself from the operating

⁶Given that the Region 10 Job Corps Officials insisted on the change in order to comply with its program requirements, and that such a change was not unreasonable, we find it unlikely that Steenbergen would have refused to approve the change.

level by layers of managers, architects, and consultants, then disclaim responsibility for the actions of one his agents because the Contractor failed to give him notice." We see no reason to depart from the Midwest rationale here.⁷

VI Subcontractor Costs

The Contracting Officer contends that Kumin cannot recover the costs claimed by subcontractors, Tryck Nyman and RSA. Relying on the decision of the Energy Board of Contract Appeals in Tibbetts Mechanical Contractors, EBCA No. 433-11-89, 90-3 BCA ¶ 23,055, the Contracting Officer contends that Kumin must have paid Tryck Nyman and RSA the amount claimed on their behalf before Kumin may include those costs in a claim for an equitable adjustment. We disagree with the Contracting Officer's interpretation of Tibbetts in relation to this appeal. Tibbetts states in pertinent part:

The proper method of computing an equitable adjustment in price is the reasonable cost of the extra work and materials plus profit. [Citations omitted.] Where subcontractors are involved, but are not claimants, it is the prime contractor's payments to them which constitute its costs, not the costs to the subcontractors. Nager Electric Co., Inc., et al v. United States, 194 Ct. Cl. 835 (1971). Tibbets, supra (emphasis added).

In Tibbetts, the appeal was brought by Tibbetts, the prime contractor, on behalf of itself and its subcontractor, Cousins.⁸ Included in Cousins' portion of the claim were costs incurred by Cousins' subcontractor, Colandro, who was not asserting a claim

⁷The notice requirement is waived if the Contracting Officer decides the constructive change claim on the merits. Watson, Rice & Company, supra. Steenbergen's final decision denying Kumin's claim was a decision on the merits of the claim, and, therefore, the notice requirement is waived. (GX 1, pp. 59, 66-7.)

⁸Cousins originally appealed the Contracting Officer's final decision denying its claim in its own name. The Department of Energy Board of Contract Appeals allowed the pleadings to be amended to substitute Tibbetts as Appellant, instead of Cousins. Cousins Construction Co., EBCA No. 433-11-89, 90-2 BCA ¶ 22,761.

in the appeal.⁹ The Board included in the equitable adjustment awarded to Tibbetts, the costs attributable to Cousins' performance, but it denied the costs attributable to Colandro's performance for failure to prove that Cousins had either paid Colandro or was otherwise liable to Colandro for those costs. The Board noted that "the concept of incurred cost includes incurred liability in addition to actual payments." Tibbetts, supra at note 4.

In essence, the Contracting Officer seems to seek application of the "Severin doctrine." Briefly, the Severin doctrine, first articulated in Severin v. United States, 99 Ct.Cl. 435 (1943), cert. denied, 322 U.S. 733, 64 S.Ct. 1045, 88 L.Ed. 1567 (1944), holds that a prime contractor cannot recover on behalf of a subcontractor unless the prime contractor has reimbursed the subcontractor or is liable to make such reimbursement. In Severin, the contract between the prime contractor and the subcontractor contained an exculpatory clause holding the prime contractor harmless from any claim caused by the actions of the government. The court, therefore, held that it had no jurisdiction to hear any claim based upon damages to the subcontractor. See also, U.S. v. Johnson Controls, Inc., 713 F.2d 1541, note 8 (Fed. Cir. 1983).

The Severin doctrine has been narrowly construed and applied to breach of contract cases. See, e.g., Blount Bros. Construction Co. v. United States, 346 F.2d 962, 964-65 (Ct. Cl. 1965). Thus, the United States Court of Claims has held that the Severin doctrine does not apply to the assertion of a claim for an equitable adjustment by a prime contractor on behalf of its subcontractors. Owens-Corning Fiberglass Corp. v. United States, 419 F.2d 439, 457 (Ct. Cl. 1969). The Armed Services Board has similarly held that "[w]here the claim is not based solely upon a breach of contract as was the case in Severin, but is rather a claim for an equitable adjustment by a prime contractor pursuing a remedy redressable under the contract, then the Severin rule is inapplicable." CWC, Inc., ASBCA No. 26432, 82-2 BCA ¶ 15,907; Jordan-DeLaurenti, Inc., ASBCA Nos. 45467, 46589, 94-3 BCA ¶ 27,031.

Unlike the Contractor in Severin, Kumin has advanced a claim on behalf of Tryck Nyman and RSA which is predicated upon the

⁹Kumin is sponsoring the claims of Tryck Nyman and RSA, just as Tibbetts sponsored the claim of Cousins in Tibbetts. Kumin is not claiming that it should be compensated for payments it made to its subcontractors, in contrast with Cousins, which claimed payments it made to Colandro.

terms of its subcontracts, pursuant to which Kumin is contractually obligated to submit its consolidated bill to the Department, and pay Tryck Nyman and RSA upon receipt of payment from the Department. Kumin, therefore, has "incurred costs" for purposes of asserting the claims of its subcontractors. Under the circumstances, Kumin may sponsor, and pursue on their behalf, Tryck Nyman's and RSA's equitable adjustment claims, and the amounts claimed by Tryck Nyman and RSA may be properly included in any equitable adjustment awarded to Kumin.

VII Quantum

Kumin claims an equitable adjustment in the amount of \$84,154.00. The Contracting Officer argues in his brief on appeal that even if Kumin is entitled to an equitable adjustment for a constructive change, it is not entitled to a monetary recovery, because it did not prove its claim with sufficient specificity to establish with contemporaneous records, the precise costs attributable to the designing of the 96-person dormitory. In this instance, after the design work was done, Kumin employed a forward-price estimate to calculate the amount of its claim.

Although Kumin did not accumulate cost data on the instant contract, and could not, therefore, identify its actual costs attributable to designing the dormitory designated to house the 96 women corpmembers, estimates may be utilized in the absence of actual design cost data, in order to quantify the costs appellant incurred in performing the design work. See, Joseph Pickard's Sons Co. V. U.S., 209 Ct. Cl. 643, 532 F.2d 739 (1976). See also Charles D. Weaver v. United States [22 CCF ¶80,145], 209 Ct. Cl. 685 (1976); Coastal Dry Dock and Repair Corp., 91-1 BCA ¶23,324.

While the Contracting Officer correctly notes that Appellant did not accumulate cost data attributable solely to the change, in the absence of such data, we find that actual cost data is not reasonably available to Appellant, and it is appropriate here to rely upon Appellant's estimates of the costs attributable with the extra work involved in designing the 96 resident dormitory. See e.g. Neal & Company, Inc., v. U.S., 19 Cl. Ct. 463 (1990). Kumin, of course, must establish its claim by a preponderance of the evidence, Neal & Co., Inc., supra at 470, citing, Teledyne McCormick-Selph v. United States, 588 F.2d 808 (Ct. Cl. 1978), and the Government may show that the costs claimed for the equitable adjustment are not reasonable. Neal, Id.

Having reviewed Appellant's estimating methodologies, we are satisfied that they are consistent with industry standards and

practice. Appellant's estimate is based upon a number of factors, each correlated with the others. Kumin estimators first established the total time spent by specific employees on the dormitory design project, then attributed 2/3 of the work to the original scope, and 1/3 to the 96-person dormitory. Since the female dormitory as changed actually accounted for 40% of the total square footage of the three structures, the 1/3 work estimate was within the range expected for a structure which represented 40% of total square footage. The estimators further noted that the changed dormitory necessitated the preparation of ten extra architectural design sheets at a composite rate of \$2900 per sheet.

Estimating the design costs by another method, Kumin considered a construction cost based upon \$100 per square foot for a 15,000 square foot structure and applied a 6% design fee. The resulting estimate of \$90,000 by this method was consistent with Appellant's estimates based upon other methodologies, taking into account the efficiencies achieved from the design of the generic dormitory. The architect further confirmed RSA's and Tryck Nyman's estimates for civil, structural, electrical, and mechanical designs which represented approximately 60% of total design costs. The evidence shows that industry practice would predict that architectural and other design costs would represent approximately 40% and 60%, respectively, of total design costs, and the various design costs attributable to the contract change before us reflect this correlation. Equally important, O'Malley testified that Kumin's estimating methodologies were consistent with industrywide standards and practice. Kumin's methodology is also reasonable in light of its accounting system, and the fact that this fixed price contract did not require a detailed accounting of Kumin's costs.

The Contracting Officer, relying primarily on the testimony of Caperton, asserted that the amounts claimed by Kumin were not reasonable, because they did not account for design efficiencies which may have been achieved by incorporating elements of the generic 120-person dormitory into the design of the 96-person dormitory.

While the generic 120-person dormitory and the 96-person dormitory reflect many design similarities, the record reveals substantial structural, electrical and mechanical differences between the two structures. Moreover, the evidence shows Kumin did take into consideration efficiencies achieved under circumstances in which design elements from the generic 120-person dormitory could be employed in the design of the 96 resident dormitory. Thus, Kumin calculated that an architectural design sheet for the 96-person dormitory represented 53.6 hours

of work, which incorporated the economies achieved from design of the generic dormitory in the 10 extra architectural design sheets necessitated by the change, and confirmed the cost estimates of its subcontractors which were factored into the calculation.

The Contracting Officer challenged the forward-price method Kumin employed to determine the amount of the equitable adjustment. We have found the method employed by Kumin consistent with the method upheld by the Court in Neil, and that the amounts claimed, including Kumin's estimate of 536 hours at a composite rate of \$54.22 per hour, totalling \$29,061; RSA's estimate of 469 hours at a composite rate of \$53.40 per hour, totalling \$25,045; and Tryck Nyman's estimate of 473 hours at a composite rate of \$63.50 per hour, totalling \$30,048, are reasonable. Accordingly, we conclude that an equitable adjustment in the amount of \$84,154 should be approved.

ORDER

The appeal is GRANTED in its entirety. The Contracting Officer shall modify the contract to reflect an equitable adjustment in the amount of \$84,154.

Stuart A. Levin
Member, Board of Contract
Appeals

JOHN M. VITTON
Chairman, Board of
Contract
Appeals

Edward Terhune Miller
Member, Board of Contract
Appeals